

# A democratic outrage: Scotland's constitutional position and Brexit

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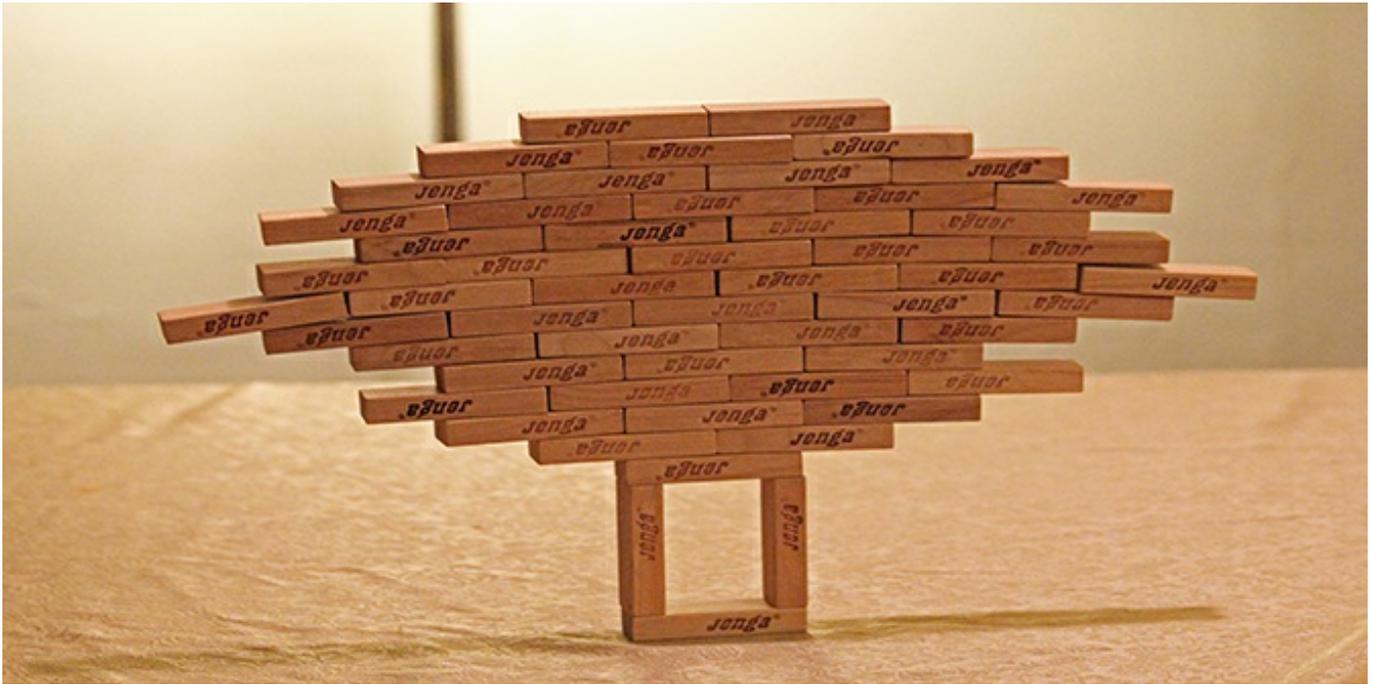
*Although reaction to the recent Supreme Court ruling on the triggering of Article 50 has focused on arguments about the sovereignty of parliament, for Scotland it has highlighted once again not that parliament is sovereign, but that the Westminster Parliament is – and that this rule applies even if Westminster intends to legislate contrary to Scottish wishes. [Sean Swan](#) explains why recent events have brought into sharp focus the broader weaknesses of Scotland's constitutional position.*

The Supreme Court ruling on whether the triggering of Article 50 required an Act of Parliament was a thing of paradox. Many people who might normally be assumed to favour *popular* sovereignty went into ecstasy over a ruling which was essentially a Diceyan reassertion of the sovereignty of parliament. Remainers embraced this sovereignty of parliament simply because the referendum – which they lost – had been an exercise in popular sovereignty. But these were English issues. Viewed from Scotland, the ruling carried a different message, not about whether sovereignty lay with the people or with parliament, but about *which* parliament was sovereign.

The Scots had hoped that the case would lead to a ruling supporting Nicola Sturgeon's position that Brexit could not proceed without the consent of the devolved nations. Although the Scottish Government was not party to the case, there was an intervention in the devolution aspect of it by the Lord Advocate on behalf of the Scottish Government. The point of law, at least in relation to Scotland, turned on to the Sewel Convention, which ensures that before legislating on devolved matters, Westminster will normally seek the express agreement of the Scottish Parliament.

The Supreme Court judgment recognised that the Sewel Convention had received 'statutory recognition' through its inclusion in the recent Scotland Act (2016), but added that had UK Parliament intended to convert it into a legal rule, they would have worded the relevant clause accordingly.

In other words, its inclusion in the Scotland Act gave the Sewel Convention 'recognition' but no legal effect. Even the Bill of Rights was quoted to prove that the convention could not be enforced by any court. And although three judges dissented on the main issue of the need for a vote in Parliament to trigger Article 50, not a single judge dissented in relation to the reasoning behind excluding the Sewel Convention.



No surprises here. Every mention of the convention – whether in Parliament, law or memoranda of understanding – is prefaced by or ringed with, caveats implying or boldly asserting the right of Westminster to legislate on any matter in Scotland, devolved or not.

The Sewel Convention is not a Scottish version of the [Statute of Westminster](#). The Supreme Court’s ruling was a reassertion of a basic fact of the British constitution: the sovereignty of Westminster, while Scotland’s (denied) right to veto Brexit was considered in terms of ‘devolution legislation’, ‘devolution arguments’ or ‘devolution issues’. ‘Devolution’ is the key term. The Scottish Parliament is not a sovereign body. Such powers as it has are simply powers *devolved* upon it from Westminster, the sovereign parliament.

First Minister Nicola Sturgeon’s [reaction](#) to the decision was to assert that even if there was no legal requirement for Westminster to seek the approval of the devolved governments prior to triggering Article 50, there is still a “clear political obligation to do so”. She is absolutely correct, but it absolutely will not happen. The Westminster Government is fully aware that if they gave the Scots the power to veto Brexit, they would use it; but, following the Supreme Court ruling, there is no legal requirement for London to give Scotland any such power.

Speaking after the Supreme Court judgement, the First Minister stated that:

*The claims about Scotland being an equal partner are being exposed as nothing more than empty rhetoric and the very foundations of the devolution settlement that are supposed to protect our interests – such as the statutory embedding of the Sewel Convention – are being shown to be worthless. This raises fundamental issues above and beyond that of EU membership.*

Sturgeon then raised the possibility of a second independence referendum. But she has not, yet, committed to holding one. Her reticence does not spring from any lingering affection for the UK state. The problem she faces is, as Gordon Wilson, former leader of the SNP [explained](#):

*The opinion polls show no movement in support for independence. It is almost as if the Scots people, through exhaustion, are in a catatonic trance. And yet there are calls for a gamble on a second*

*referendum without adequate preparation. The Yes vote is just as likely to decrease as to surge. It defies common sense.*

But Nicola Sturgeon has never been short of common sense. The dilemma she faces is that despite Brexit, the [latest polls](#) show support for independence has barely increased since 2014. And this has been [consistent](#) since the Brexit referendum. Sturgeon cannot risk losing a second independence referendum – it would put Scottish independence back by a generation.

Yet Scotland's position within the UK is intolerable. Under the British constitution, it is irrelevant that 57 of Scotland's 59 MPs are opposed to Brexit; irrelevant that Scotland voted two to one against Brexit; and irrelevant that Brexit is opposed by the parliament and government of Scotland. Regardless of whether or not there is a majority in favour of outright independence, the *status quo* reduces democracy in Scotland to a mockery in which neither (Scottish) popular nor (Scottish) parliamentary sovereignty apply.

Nor would any future 'federal' UK change this. Membership of the EU, like nuclear weapons and wars in the Middle East, is a matter of foreign policy, and foreign policy is invariably a matter reserved for central government, even in federal systems.

The logic of this situation may force the First Minister to opt for the gamble of a second Indyref. In any event, it is clear that Scotland's current constitutional position is a democratic outrage. This is what Brexit in general, and the supreme court case in particular, has brought into sharp focus.

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